
**Before the
Federal Communications Commission
Washington, DC 20554**

In the Matter of)
)
Reexamination of Roaming Obligations of) WC Docket No. 05-265
Commercial Mobile Radio Service Providers)
)
To: The Commission

REPLY COMMENTS OF CINGULAR WIRELESS LLC

J. R. Carbonell
Carol L. Tacker
5565 Glenridge Connector
Suite 1700
Atlanta, GA 30342
(404) 236-5543

Counsel for Cingular Wireless LLC

January 26, 2006

SUMMARY

Cingular Wireless LLC (“Cingular”) supports elimination of the manual roaming rule and opposes the regulation of automatic roaming agreements. The Commission has recognized that an automatic roaming requirement is inconsistent with both the de-regulatory mandate of the Telecommunications Act of 1996 and the FCC’s general policy of allowing market forces, rather than regulation, to shape the development of wireless services. The CMRS marketplace is competitive and proponents of automatic roaming requirements have presented no evidence of a market failure. These proponents also have not explained how any alleged market power in the wholesale market can translate into consumer harm in the admittedly competitive retail market.

Although roaming rates may exceed some retail rates, the current price differential is consistent with a competitive marketplace and the historical margin associated with these rates. Moreover, the actual retail and roaming rates have dropped substantially over the last few years.

Recent consolidation also provides no basis for the adoption of automatic roaming regulations. Although consolidation did eliminate AT&T Wireless Services, Inc. and its subsidiaries as a GSM roaming option, the merger of Alltel Corp. and Western Wireless Corp. created a new nationwide carrier with the ability to offer roaming to *both* CDMA and GSM carriers. Accordingly, regulation of automatic roaming is unnecessary and would be inconsistent with the de-regulatory mandate adopted by Congress in the 1996 Act.

Regulation of manual roaming also is unnecessary. In short, the public interest is not advanced by mandating a service that the public does not use. The record demonstrates that manual roaming is rarely utilized and that GSM networks do not even support manual roaming. In addition, the record demonstrates that there is no longer any need for the manual roaming rule. As demonstrated in Cingular’s initial comments, there were three bases for the rule: promote broad coverage; facilitate low-cost equipment; and eliminate the headstart advantage held by cellular carriers. Today, the headstart advantage is gone. There are numerous CMRS competitors in each market and many carriers offer nationwide service. There also has been a proliferation of automatic roaming and national service plans, as well as the availability of roaming alternatives (such as pre-paid service with low-cost phones). Accordingly, the rule should be eliminated.

TABLE OF CONTENTS

SUMMARY	i
I. THE RECORD LACKS CONCRETE EVIDENCE OF A MARKET FAILURE AND, THEREFORE, AUTOMATIC ROAMING REGULATIONS WOULD BE CONTRARY TO THE PUBLIC INTEREST	2
II. RECENT CONSOLIDATION DOES NOT JUSTIFY THE IMPOSITION OF AN AUTOMATIC ROAMING REQUIREMENT	12
III. THE RECORD ESTABLISHES THAT THE MANUAL ROAMING RULE SHOULD BE ELIMINATED.....	16
CONCLUSION.....	17

Before the
Federal Communications Commission
Washington, DC 20554

In the Matter of)
)
Reexamination of Roaming Obligations of) WC Docket No. 05-265
Commercial Mobile Radio Service Providers)
)

To: The Commission

REPLY COMMENTS OF CINGULAR WIRELESS LLC

Cingular Wireless LLC (“Cingular”) hereby replies to comments filed in response to the *Notice of Proposed Rulemaking* in the captioned proceeding.¹ The record in this proceeding clearly establishes that automatic roaming regulations are not necessary and that the existing manual roaming rule should be eliminated. The Commission has previously indicated that automatic roaming regulations will not be adopted absent substantial, concrete evidence of a market failure.² There is no market failure. The record does not contain such evidence and, as demonstrated in the attached White Paper prepared by Professor Thomas W. Hazlett, proponents of an automatic roaming requirement have failed to provide any valid economic justification for the rule.³ Professor Hazlett also demonstrates that adoption of an automatic roaming

¹ *Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers*, WT Docket No. 05-265, *Notice of Proposed Rulemaking*, FCC 05-160 (rel. Aug. 24, 2005) (“NPRM”).

² *See Automatic and Manual Roaming Obligations Pertaining to Commercial Mobile Radio Services*, WT Docket 00-193, *Notice of Proposed Rulemaking*, 15 F.C.C.R. 21628, 21635-36 (2000).

³ *See* Thomas Hazlett, “Mobile Roaming & Rate Regulation: An Economic Analysis,” (Jan. 20, 2006) (“Hazlett White Paper”) *filed as an attachment herewith*. In fact, Professor Hazlett notes that the proponents of regulation never explain how alleged market power in the wholesale market can translate into consumer harm in the competitive retail market (*i.e.*, how this alleged market power negatively impact consumers).

requirement actually would be detrimental to wireless consumers and the CMRS industry. To the extent a few carriers have been unable to obtain automatic roaming agreements, the Section 208 complaint process provides the appropriate vehicle for addressing this issue. Notably, despite claims that FCC intervention is necessary, there has been a dearth of Section 208 complaints. Finally, the manual roaming rule should be eliminated because the record demonstrates that manual roaming is rarely used by consumers.

I. THE RECORD LACKS CONCRETE EVIDENCE OF A MARKET FAILURE AND, THEREFORE, AUTOMATIC ROAMING REGULATIONS WOULD BE CONTRARY TO THE PUBLIC INTEREST

The Commission has recognized that an automatic roaming requirement is inconsistent with both the de-regulatory mandate of the Telecommunications Act of 1996 and the FCC's general policy of allowing market forces, rather than regulation, to shape the development of wireless services.⁴ Given this high standard, it is not surprising that in every prior roaming proceeding addressing the need for automatic roaming, the Commission has determined that the record was insufficient to justify an automatic roaming requirement.⁵

The instant proceeding was initiated in response to a request by the Rural Telecommunications Group ("RTG") to take a fresh look at roaming in light of recent industry consolidation. The Commission sought "*specific evidence* of wireless providers denying roaming agreements to other providers *in a manner that harms consumers.*"⁶ In taking this fresh look, Cingular agrees with RTG that regulation is warranted "only in light of *persuasive*

⁴ See *Interconnection and Resale Obligations Pertaining to Commercial Mobile Radio Services*, CC Docket No. 94-54, *Second Report and Order and Third Notice of Proposed Rulemaking*, 11 F.C.C.R. 9462, 9477 (1996).

⁵ *Interconnection and Resale Obligations Pertaining to Commercial Mobile Radio Services*, CC Docket No. 94-54, *Third Report and Order and Memorandum Opinion and Order on Reconsideration*, 15 F.C.C.R. 15975, 15976, 15983 (2000); *NPRM* at ¶ 1.

⁶ *NPRM* at ¶ 41 (emphasis added).

*evidence that there is wide-spread anticompetitive behavior with respect to CMRS roaming.”*⁷

The record compiled in this proceeding does not contain such evidence, and recent industry consolidation does not provide an alternative basis for roaming regulation.

Twenty one parties filed comments in the proceeding. Despite the Commission’s request for specific evidence of nationwide carriers denying automatic roaming, no such evidence was submitted. The only specific allegations that a carrier was unwilling to enter into automatic roaming agreements regarding voice telephony were levied against Nextel Partners, Inc. (“Nextel Partners”).⁸ Even then, only two parties raised this allegation. These isolated disputes with a single carrier do not constitute “persuasive evidence that there is wide-spread anticompetitive behavior with respect to CMRS roaming” and do not justify adoption of automatic roaming regulations. Resolution of the roaming disputes between the individual parties involved is an appropriate subject for a complaint proceeding, but does not justify an industry-wide rulemaking.⁹

⁷ Comments of the Rural Telecommunications Group, CC Docket No. 94-54 at 3 (filed Oct. 4, 1996) (emphasis added).

⁸ See Joint Comments of AIRPEAK Communications, LLC and Airtel Wireless, LLC, WT Docket No. 05-265 at 7 (filed Nov. 28, 2005) (“Joint Commenters”); Comments of SouthernLINC Wireless, WT Docket No. 05-265, at 12-13 (filed Nov. 28, 2005) (“SouthernLINC Comments”); *cf.* Comments of ACS Wireless, Inc., WT Docket No. 05-265, at 4 (filed Nov. 28, 2005) (“ACS Wireless Comments”) (claiming that it has been unable to enter into data-only roaming agreements with other CDMA carriers).

⁹ The Commission sought comment on the viability of the Section 208 complaint process as a mechanism for ensuring that CMRS providers do not unreasonably deny automatic roaming agreements or unreasonably discriminate with respect to the terms of such agreements. See *NPRM* at ¶¶ 33-34. Only 2 commenters maintained that Section 208 was an inadequate remedy and their main criticism was that the process is burdensome. See Comments of the Rural Telecommunications Group, Inc. and the Organization for the Promotion and Advancement of Small Telecommunications Companies, WT Docket No. 05-265, at 16 (filed Nov. 28, 2005) (“RTG/OPASTCO Comments”); SouthernLINC Comments at 50-53. The Section 208 complaint process was designed to place the burden on complainants to demonstrate that the law has been violated, and this applies in the context of roaming as well as other complaints. The complaint process is no more burdensome to those with roaming disputes than to other complainants; the fact that the complainant has the burden to make out its case is no basis for

(continued on next page)

A few parties made generalized statements implying that nationwide carriers may be foreclosing smaller carriers from obtaining automatic roaming agreements,¹⁰ but no one identified a single instance where a nationwide carrier was unwilling to enter into an automatic roaming agreement.¹¹ In fact, the record persuasively demonstrates that there has been no market failure and that the nationwide carriers have successfully negotiated automatic roaming agreements with the vast majority of carriers.¹²

- Cingular has entered into more than 100 automatic roaming agreements with domestic carriers operating GSM and TDMA networks;¹³
- T-Mobile USA, Inc. (“T-Mobile”) has entered into automatic roaming agreements with every GSM carrier in the United States;¹⁴
- Centennial Communications Corp. (“Centennial”) asserts that “there is no industry-wide problem with roaming arrangements today;”¹⁵
- United States Cellular Corporation (“USCC”) states that “Tier I wireless carriers have, for the most part, treated smaller, mid-sized and regional carriers such as USCC fairly in roaming negotiations, and that the present roaming marketplace does not justify a new prescriptive rule.”¹⁶

As Professor Hazlett posits:

concluding that Section 208 is an inadequate remedy; it is, in fact, the remedy prescribed by Congress for resolving such all such disputes.

¹⁰ See ACS Wireless, Inc. Comments at 4; Leap Comments at 2; MetroPCS Comments at 3, 8-9.

¹¹ Only Nextel Partners was identified as a company that refused to enter into such agreements. See Joint Comments at 7; SouthernLINC Comments at 12-13.

¹² See Hazlett White Paper at 16-17 (noting that the large number of automatic roaming agreements negotiated by nationwide carriers demonstrates that there is no “foreclosure” of roaming opportunities for smaller carriers).

¹³ See Comments of Cingular Wireless, LLC, WT Docket No. 05-265, at 11 (filed Nov. 28, 2005) (“Cingular Comments”).

¹⁴ See Comments of T-Mobile USA, Inc., WT Docket No. 05-265, at 3 (filed Nov. 28, 2005) (“T-Mobile Comments”).

¹⁵ Comments of Centennial Communications Corp., WT Docket No. 05-265, at 5 (filed Nov. 28, 2005).

¹⁶ USCC Comments, WT Docket No. 05-265, at 2 (Nov. 28, 2005).

Roaming agreements extended by national wireless networks to other carriers, as with wholesale contracts allowing MVNO subscribers to roam nationwide ‘off-net,’ yield voluminous evidence rejecting the foreclosure hypothesis. The question is, were it profitable to extend 100 roaming agreements to other carriers, or half a dozen MVNO contracts, how can it be strategic to anti-competitively withhold the 101st roaming agreement? It is not plausible that an efficient, profitable contract for the national network could be rejected such that retail market share grows because the marginal entrant into the nationwide wireless market – the 300th or 400th – is now excluded.¹⁷

A careful reading of the comments submitted by parties urging adoption of an automatic roaming rule demonstrates that there has not been a refusal of nationwide carriers to enter into roaming agreements. The comments by the automatic roaming proponents make clear that the real objection involves the rates charged by large carriers for automatic roaming, not the unavailability of automatic roaming agreements.¹⁸ For example:

- Leap Wireless International, Inc. (“Leap”) claimed that large carriers “have refused to negotiate *reasonable* terms” for automatic roaming;¹⁹
- Metro PCS Communications, Inc. asserted that it has had difficulty reaching “suitable [automatic roaming] arrangements at *reasonable rates* with the major national carriers;”²⁰ and

¹⁷ Hazlett White Paper at 18.

¹⁸ Some commenters argue that the lowest roaming rate offered to one carrier must be made available to everyone. *See, e.g.,* SouthernLINC Comments at 5, 36. The Commission has previously rejected similar arguments because the Communications Act only prohibits unjust and unreasonable discrimination. *See* 47 U.S.C. §§ 201(b), 202(a). *See also, Digital Cellular Inc., Memorandum Opinion and Order*, DA 05-1276, at ¶¶ 13-15 (rel. May 3, 2005) (finding that AirTouch Cellular, Inc. did not violate §§ 201(a), 201(b), and 202(a) of the Communications Act by not offering its communications services to one reseller at the same price, terms, and conditions that it had given to another reseller because the two resellers “were not similarly situated”). With respect to CMRS roaming, rates may vary based on a number of factors, such as the technology utilized and the features available. *Cf.* Comments of the Rural Cellular Association, WT Docket No. 05-265 at 5 (filed Nov. 28, 2005) (“RCA Comments”) (noting that a carrier should be permitted to “enter[] into roaming agreements containing different terms and conditions, including price terms, with different service providers if such different terms and conditions are based on competitive marketplace considerations”).

¹⁹ Leap Comments at 2 (emphasis added).

²⁰ MetroPCS Comments at 3.

- NTCH, Inc. acknowledged that it was able to enter into an automatic roaming agreement with a nationwide CDMA carrier, but complained that the *rates were too high*.²¹

Ironically, while the aforementioned carriers seek Commission intervention because they believe large carriers are charging unreasonably high roaming rates, RTG complains that the reciprocal roaming rates sought by larger carriers are *too low*.²² RTG purported to provide nine examples of “egregious and anticompetitive behavior by large CMRS carriers,” yet these examples merely demonstrate the pro-consumer, competitive nature of the CMRS marketplace.²³ As its initial example of the “incredible market power” of large carriers, RTG claimed that AT&T Wireless Services, Inc. (“AWS”), which is now part of Cingular, prohibited its subscribers from roaming onto a small rural carrier’s network for a few weeks in 2003 in an anticompetitive attempt to force a rural carrier to accept asymmetrical, below-cost rates.²⁴ The reality was quite different and establishes that the market protects consumers.

RTG’s example describes the relationship between AWS and Artic Slope Wireless (“Artic Slope”) in Barrow, Alaska. In 1995, Artic Slope and AWS entered into an automatic roaming agreement with a *reciprocal* rate of \$0.99 per minute. As CMRS rates decreased over

²¹ See Comments of NTCH, Inc., WT Docket No. 05-265, at 3-4 (filed Nov. 28, 2005). Other parties such as RCA, never claim that they were denied automatic roaming. RCA Comments at n.4 (merely claiming that some members “experienced *difficulty* in engaging at least one large wireless carrier in negotiation of automatic roaming agreements for *wireless data services*”) (emphasis added).

²² RTG/OPASTCO Comments at 11-13.

²³ *Id.*

²⁴ *Id.* at 11. RTG also cited two other examples purportedly to demonstrate that AWS was using market power to behave anticompetitively. *Id.* at 11, 13. These examples do not support RTG’s proposition. In each case, AWS had the option of shifting its roaming traffic to a carrier with better service features or lower rates. The RTG members involved in the examples had the option of matching or beating the competitive roaming packages (rates and features) available or forgoing AWS roamers. Matching only one part of the package (*i.e.*, the rate) was insufficient to retain roaming traffic from AWS subscribers. AWS did not exercise market power or act anticompetitively. Instead, competitive forces undermined the ability of the RTG members to unilaterally establish the roaming packages available to AWS subscribers.

the years, AWS attempted to reduce roaming charges but Artic Slope was reluctant to reduce the reciprocal roaming rate substantially.²⁵ In 2003, an Artic Slope competitor agreed to provide roaming to AWS subscribers at a lower rate. AWS thus altered its roaming database to ensure that its subscribers roamed on the system with the lower roaming rate.²⁶ AWS subsequently became dissatisfied with the level of roaming service its customers were receiving in Barrow from Artic Slope's competitor and was faced with two options: high rates charged by Artic Slope or poor roaming service from the competitor. AWS then approached Artic Slope about lowering the roaming rates and the parties reached an agreement that established a *reciprocal* roaming rate of \$0.17 per minute.²⁷ Thus, competition, not market power, triggered a reduction in roaming rates in Barrow.

The record demonstrates that larger carriers generally enter into reciprocal roaming agreements with rural carriers whereby both carriers pay each other the same roaming rate when their customers roam on the other carrier's system. The record also demonstrates that when the rates are not symmetrical, it is the *smaller carrier* that generally is charging the higher rate.²⁸ Those parties urging Commission intervention imply that the larger carriers dominate the

²⁵ NTCH makes the exact *opposite* argument — that nationwide carriers are *refusing* to reduce their roaming rates. See NTCH Comments at 3-6.

²⁶ Cingular and Verizon Wireless explained in their initial comments a variety of reasons why roaming preferences are created and why their subscribers' devices may be directed to roam on one network rather than another. See Cingular Comments at 28-30; *accord* Comments of Verizon Wireless, WT Docket No. 05-256, at 5-6 (filed Nov. 28, 2005) ("Verizon Wireless Comments"). Even SouthernLINC acknowledges that carriers should not be forced to allow their subscribers to automatically roam on other networks. See SouthernLINC Comments at 40. Although adamantly opposed to automatic roaming regulations, Cingular agrees with SouthernLINC that if such regulations are adopted, they only should require in-bound roaming. *Id.*

²⁷ Given the reciprocal nature of the roaming rate, Cingular is perplexed by RTG's claim that Artic Slope was required "to pay a premium to access the AT&T network." See RTG/OPASTCO Comments at 11.

²⁸ See Verizon Wireless Comments at 5-6.

roaming market. This is not true. Cingular is a net payor in the current roaming environment²⁹ — it pays more roaming fees than it collects. Verizon Wireless also acknowledged that it is a net payor.³⁰

What proponents of automatic roaming agreements really want is a regulatory regime where small carriers pay a low rate to roam on large carrier networks and large carriers pay a higher rate to roam on the networks of smaller carriers.³¹ In effect, they want the government to insulate them from competitive forces that have driven down roaming rates.

In addition, some parties have urged the Commission to establish a presumption that any roaming rates that exceed average retail rates are unreasonable.³² This proposal should be rejected. First, some small carriers designed and built CMRS systems *primarily* to serve roamers.³³ These carriers have few customers and have higher roaming and retail rates than the nationwide carriers. To reduce reliance on these carriers for roaming and therefore reduce roaming costs, many competitors have extended their own networks into these areas. The ensuing increase in facilities-based competition drove roaming rates downward. As a result, some rural carriers have complained that roaming rates are too low and they should be allowed to charge more for roaming than larger carriers.³⁴ Under the proposed presumption, they would be permitted to force large carriers to pay these high rates and the large carriers would be precluded from seeking the same rate in return. This approach would disserve the public interest because it

²⁹ See *Applications of AT&T Wireless Services, Inc. and Cingular Wireless Corporation*, WT Docket Nos. 04-70, 04-254, 04-323, *Memorandum Opinion and Order*, 19 F.C.C.R. 21522, 21591-92 (2004) (“*Cingular/AWS Merger Order*”).

³⁰ See Verizon Wireless Comments at 11.

³¹ See, e.g., RTG/OPASTCO Comments at 3-4; Leap Comments at 17-20.

³² See, e.g., Leap Comments at 12.

³³ See Verizon Wireless Comments at 15.

would insulate the smaller carriers from competitive forces and inhibit the reduction in roaming costs.³⁵

Second, there is no basis for establishing a presumption that roaming rates that exceed retail rates are unreasonable.³⁶ As Professor Hazlett notes:

[F]irms with substantial sunk assets are *competitively constrained* not to uniformly price at marginal cost, but to capture higher increments of support from inelastic customers while extending additional low-cost bargains to elastic buyers. Often, other non-linear pricing arrangements appear, including contractual terms that help enlist support for the fixed investments undertaken by the supplier.

Identifying such practices as anti-competitive conduct can be an egregious error The danger is that policy makers, mistaking efficient pricing schemes as anti-consumer, impose rules that make

³⁴ See Comments of the National Telecommunications Cooperative Association, WT Docket No. 05-71, at 5 (filed March 28, 2005) (arguing that roaming rates are “ridiculously low”); RTG/OPASTCO Comments at 11-13.

³⁵ The Commission previously has prohibited carriers with higher operating costs from passing those costs on to roamers when the carriers have quasi-monopolies in their areas. See *Cellular Service and Other Commercial Mobile Radio Services in the Gulf of Mexico*, WT Docket No. 97-112, *Report and Order*, 17 F.C.C.R. 1209, 1220 (2002) (finding that “the operating costs of Gulf carriers are typically higher than those of land-based carriers” and prohibiting them from recovering these costs “by charging uncompetitive rates or roaming charges to their customers”).

³⁶ A few parties also urge the Commission to make the terms of roaming agreements publicly available. See MetroPCS Comments at 16-19; Comments of NY3G Partnership, WT Docket No. 05-25, at 4 (filed Nov. 28, 2005); see also NY3G Partnership Comments at 7-8 (urging the Commission to require Sprint Nextel Corporation (“Sprint Nextel”) to publish all of its roaming agreements). These parties use the same arguments that CMRS resellers have traditionally made — that a tariffing-type requirement would create transparency and permit parties to determine whether they are receiving services at just and reasonable rates. The Commission previously has concluded, however, that requiring carriers to publish rates in a competitive environment can inhibit competition and increase costs. See *Implementation of Sections 3(n) and 332 of the Communications Act*, GN Docket No. 93-252, *Second Report and Order*, 9 F.C.C.R. 1411, 1479 (1994). Accordingly, the Commission *prohibited* CMRS carriers from filing tariffs. *Personal Communications Industry Association's Broadband Personal Communications Services Alliance's Petition for Forbearance For Broadband Personal Communications Services*, WT Docket No. 98-100, *Memorandum Opinion and Order and Notice of Proposed Rulemaking*, 13 F.C.C.R. 16857, 16885-86 (1998). No party rebutted the Commission’s prior conclusions or presented new evidence that would justify a re-imposition of a tariffing or other rate publication requirement.

consumers worse off. This risk is seen in the application to enlist regulation of mobile roaming rates. Imposing access terms to wholesale users who shoulder no contractual obligations, no commitments for purchase quantities, and no cooperative investments allows such users to free-ride on sunk investments, discouraging such undertakings and deterring network infrastructure creation.³⁷

Proponents in favor of the presumption argue that regulation is necessary because “large carriers have demanded rates for automatic roaming that are on average nearly *four times* higher” than the average retail rate.³⁸ This differential between roaming and retail rates is nothing new. Until recently, roaming rates traditionally have exceeded retail rates.³⁹ For example, in 1999 when RTG was opposed to the imposition of an automatic roaming requirement, there was a 4:1 price differential between roaming and average retail rates. The average per-minute roaming rate charged to other carriers by six large regional carriers was approximately \$0.43 per minute⁴⁰ and the average retail rate for a large bucket of minutes (600) was only \$0.11 per minute.⁴¹ It should be no surprise that a similar price differential remains today. The critical public interest question is whether consumer welfare is being maximized. As noted by Professor Hazlett, consumers are

³⁷ Hazlett White Paper at 10.

³⁸ Leap Comments at 13 (emphasis in original); *see* USCC Comments at 14; RTG/OPASTCO Comments at 9-10. The use of an “average” roaming rate is misleading because roaming rates vary according to technology. For example, Cingular’s GSM roaming rate traditionally has been lower than its TDMA roaming rate. The lower roaming rate for GSM has encouraged other carriers to convert to GSM, thus expanding the available pool of GSM roaming partners.

³⁹ *See Cingular/AWS Merger Order*, 19 F.C.C.R. at 21588-89 (noting that the average per-minute roaming rate charged to other carriers by six large regional carriers showed an 18 percent decrease from \$0.43 per minute in 1999 to \$0.36 per minute in 2000. The rates, which clearly exceeded the average retail rate, were not characterized as unreasonable); *La Star Tel. Co.*, 6 F.C.C.R. 6860, 6875-76 (ALJ 1991); *Susquehanna Cellular*, 1 F.C.C.R. 303, 303 (CCB 1986) (all parties to dispute acknowledging that roaming fees are higher than retail rates).

⁴⁰ *Annual Report and Analysis of Competitive Market Conditions with Respect to Commercial Mobile Services*, FCC 02-179, *Seventh Report*, 17 F.C.C.R. 12985 at Table 10 (2002); *accord Annual Report and Analysis of Competitive Market Conditions with Respect to Commercial Mobile Services*, FCC 00-289, *Fifth Report*, 15 F.C.C.R. 17660, 17679 (2000) (“*5th Annual CMRS Competition Report*”).

reaping benefits due to lower prices.⁴² As recognized by the Commission's annual CMRS competition reports:

[T]here is ample evidence of a sharp decline in mobile telephone price in the period since the launch of PCS service. One analyst estimated that the average per-minute cost of wireless calling plunged over 65 percent in the past four years alone.⁴³

The Commission must recognize that many of the parties now urging regulation of automatic roaming previously maintained that such regulation was not necessary in a duopoly environment.⁴⁴ For example, RTG maintained that regulation could not be justified because "CMRS carriers do not possess market power over roamers in their markets. Cellular roamers generally have the choice to utilize either of two cellular networks."⁴⁵ Of course, this position was taken when RTG's members were part of the cellular duopoly and PCS was a nascent industry. Now that the PCS industry has matured and eliminated the cellular duopoly, RTG (among others) claims that a duopoly creates market power and justifies regulation.⁴⁶ The Commission should not condone this positional flip-flop, especially without pervasive evidence

⁴¹ 5th Annual CMRS Competition Report, 15 F.C.C.R. at 17679.

⁴² See Hazlett White Paper at 16.

⁴³ Annual Report and Analysis of Competitive Market Conditions with Respect to Commercial Mobile Services, WT Docket No. 05-71, Tenth Report, FCC 05-173, at ¶¶ 154, 128 (rel. Sept. 30, 2005) ("10th Annual CMRS Competition Report") (citation omitted) (The report also found that roaming rates have continued to decline.); see Annual Report and Analysis of Competitive Market Conditions with Respect to Commercial Mobile Services, WT Docket No. 02-379, Eighth Report, 18 F.C.C.R. 14783, 14829 (2003) (noting that roaming and retail rates declined in 2002, with retail rates declining roughly 2%); Annual Report and Analysis of Competitive Market Conditions with Respect to Commercial Mobile Services, WT Docket No. 04-111, Ninth Report, 19 F.C.C.R. 20597, 20665 (2004) ("9th Annual CMRS Competition Report") (noting that two of three indicators of mobile telephony pricing demonstrated that the long-term decline in CMRS rates continued in 2003).

⁴⁴ See, e.g., Comments of the Rural Telecommunications Group, CC Docket No. 94-54 at 2 (Jan. 20, 1999).

⁴⁵ Id.

⁴⁶ Ironically, automatic roaming agreements were first implemented without the need for FCC regulation in the cellular duopoly environment.

of a market failure and consumer harm. As discussed above, there is no such evidence. Automatic roaming agreements were first implemented without FCC regulation during the cellular duopoly and the record demonstrates a steady reduction in roaming rates.⁴⁷ These facts are not indicative of market failure.

Moreover, the Commission should consider prior experience with wireless rate regulation as a strong indicator that such regulation will serve the public interest. As Professor Hazlett notes: “At both the retail and wholesale levels, state utility commissions were free to regulate rates prior to August 1994. Those regulatory interventions were found to fail; rates were not lower, and may have been higher, in states that regulated cellular rates.”⁴⁸

In sum, the CMRS marketplace remains extremely competitive, there is no evidence of a market failure, and there is no evidence of consumer harm. Although roaming rates traditionally exceeded retail rates by a 4:1 margin, recent data indicates that this margin has been decreasing.⁴⁹ Moreover, the actual retail and roaming rates have dropped substantially over the last few years. Accordingly, regulation of automatic roaming is unnecessary and would be inconsistent with the de-regulatory mandate adopted by Congress in the 1996 Act.

II. RECENT CONSOLIDATION DOES NOT JUSTIFY THE IMPOSITION OF AN AUTOMATIC ROAMING REQUIREMENT

The proponents of automatic roaming regulation claim there are separate and distinct CMRS roaming markets for each air interface used in the industry.⁵⁰ From this perspective, the proponents argue that regulation is necessary because recent consolidation has created duopoly

⁴⁷ See, e.g., Gregory Rosston, “An Economic Analysis of How Competition Has Reduced High Roaming Charges,” at 2 (Nov. 2005) (“Rosston Economic Analysis”) *filed as an attachment to* Comments of Sprint Nextel, WT Docket No. 05-265 (file Nov. 28, 2005); Verizon Wireless Comments at 8.

⁴⁸ Hazlett White Paper at 22 (citation omitted).

⁴⁹ *Id.* at 13.

CDMA and GSM roaming markets and a monopoly with respect to the iDEN roaming market. There are no such technology-specific roaming markets.

As discussed in the Hazlett White Paper, the analyses submitted by R. Preston McAfee on behalf of SouthernLINC and the ERS Group on behalf of Leap Wireless which attempt to establish separate CMRS roaming markets are fundamentally flawed.⁵¹ Even assuming, arguendo, that these separate roaming markets did exist, the existence of duopolies do not justify regulation. The Commission has recognized that the presence of at least two nationwide carriers utilizing the same technology, in conjunction with regional and local carriers utilizing the same technology, is “sufficient to ensure the availability of . . . roaming services at competitive rates.”⁵² Consistent therewith, Professor Hazlett notes:

The argument for regulation, while premised on alleged market power in wholesale markets, claims that this power is used to block entry into highly competitive retail markets. It posits that “duopoly” networks profitably refuse to grant reasonable roaming terms to small rural carriers that would then offer end customers (wireless phone users) the ability to use the nationwide carriers’ own networks, intensifying direct competition for subscribers.⁵³

⁵⁰ See SouthernLINC Comments at 3-4; Joint Commenters at 5-7; Leap Comments at 10; RTG/OPASTCO Comments at 3.

⁵¹ See Hazlett White Paper at 18 (noting that the “idea that each technology platform constitutes a separate market” is “empirically false”); Rosston Economic Analysis at 27 (“[n]arrow technology-specific relevant markets would be inappropriate because a hypothetical monopolist of a specific technology in another area could not increase prices profitably in the home market by raising roaming charges.”).

⁵² *Cingular/AWS Merger Order*, 19 F.C.C.R. at 21588.

⁵³ “Wholesale markets for CMRS roaming services are in many places monopolies or duopolies. The four nationwide carriers, who are the monopoly and duopoly wholesale providers, employ anti-competitive pricing policies, often charging wholesale per minute rates significantly more than they charge their own retail customers. These practices occur despite the fact that, on average, wholesale minutes are less costly for carriers to provide. Such practices are clearly carried out with the intent of restricting output and raising costs of unaffiliated regional competitors. Some consumers are harmed by these wholesale practices, as regional providers offer services, features, and rate plans not offered by the nationwide operators. Current wholesale pricing practices of the nationwide carriers make actual and potential customers of those regional carriers choose between those services and roaming.” Preston McAfee, “The Economics of
(continued on next page)

But the foreclosure alleged is not a rational economic strategy for two reasons. First, the retail market is competitive, as held by the FCC and as acknowledged by parties advocating regulation. To forego a contract with an efficient retail service provider, one which will pay the network owner receipts in excess of its costs, a network sacrifices profits in order to create benefits that will accrue to its rivals. Either in the wholesale market, where the duopolistic competitor may offer the efficient contract, or in the retail market, where several competitive options exist, the *output restriction* attempted would be met by rivals' *output expansion*. If the network owner cannot itself restrict output to drive up price in the retail market, the sine qua non of a competitive market structure, it cannot implement this strategy by restricting resale of its network (e.g., by a small rural wireless carrier seeking a roaming agreement). Because the retail market is highly competitive, either form of output restriction fails.

Second, were a roaming agreement between the large and small carriers to be consummated, the market power alleged to reside in the wholesale market would remain undisturbed. The resale of minutes for roaming customers leaves the structure of the wholesale market intact. . . . Denying the small wireless carrier access to roaming minutes on the large nationwide network does not change wholesale market structure and, because the retail market is competitive to begin with, does not materially change retail market structure.

In short, the national carrier with market power in the wholesale market is not incented to foreclose retail entry. There is nothing gained, while revenues (and profits) are lost.⁵⁴

Moreover, even under the proponents' technology-specific, nationwide analysis, recent consolidation has had no adverse impact on competition or roaming generally. The Sprint Corp./Nextel merger had no impact on roaming because the merging companies utilized different technologies. The Cingular/AWS merger did reduce the number of nationwide GSM roaming partners, but the merger of Alltel Corp. ("Alltel") and Western Wireless Corp. ("Western")

Wholesale Roaming in CMRS Markets," at 16 (Nov. 28, 2005), *filed as an attachment to SouthernLINC Comments*.

⁵⁴ Hazlett White Paper at 12.

created a new nationwide carrier operating both CDMA *and* GSM networks.⁵⁵ Although Alltel primarily offers CDMA, thus increasing the number of nationwide CDMA carriers from two to three, one of the touted public interest benefits of the merger was the ability of the combined company to expand the existing GSM roaming-only network utilized by Western.⁵⁶ The consolidation of Alltel and Western thus has increased the potential roaming options for carriers utilizing either GSM or CDMA.

Finally, some small carriers made the unsubstantiated claim that their roaming revenues have decreased due to anticompetitive behavior by larger carriers. Cingular disputed this allegation and noted that many smaller carriers have been slow to convert to GSM, which reduces roaming revenue as a growing percentage of Cingular's subscribers utilize GSM.⁵⁷ Cingular's analysis was supported by recent press reports noting that Centennial's roaming revenues *increased by 65 percent* in its second quarter *due to increased GSM traffic*.⁵⁸ Rural Cellular Corp. also has noted that the decline in its roaming revenue was due to "the transitional nature of its next generation networks" (*i.e.*, GSM was not yet fully deployed).⁵⁹

⁵⁵ See *Tenth CMRS Competition Report* at ¶ 25. This Report defined a nationwide carrier as one that offers "facilities-based service in at least some portion of the western, midwestern, and eastern United States." *Id.* Although the Report did not identify Alltel as a nationwide carrier, it only listed the nationwide carriers in existence as of June 2005. *Id.* Alltel's merger with Western in *August 2005* resulted in a company with facilities-based service in portions of the western, Midwestern, and eastern United States.

⁵⁶ See *Applications of Western Wireless Corporation and Alltel Corporation for Consent to Transfer Control of Licenses and Authorizations*, WT Docket No. 05-50, *Memorandum Opinion and Order*, FCC 05-138, at ¶ 154 (rel. July 19, 2005). Thus, if national GSM carriers attempted to raise roaming rates, Alltel could easily expand its existing GSM roaming network.

⁵⁷ See Cingular Comments at 18-19.

⁵⁸ *Centennial Reaps Revenues from GSM Roaming Traffic*, RCR News (Jan. 6, 2006).

⁵⁹ See Rural Cellular Corp., SEC Form 10-Q available at <http://biz.yahoo.com/e/050809/rccc10-q.html>.

III. THE RECORD ESTABLISHES THAT THE MANUAL ROAMING RULE SHOULD BE ELIMINATED

The record compiled in this proceeding demonstrates that the manual roaming rule should be eliminated. Of the twenty-one parties submitting comments, only 6 urged the Commission to retain the rule. Moreover, the record demonstrates that manual roaming is rarely utilized and is unnecessary. For example:

- USCC stated that “[m]anual roaming is *simply not used by customers*. For example, the number of either outbound or inbound manual roaming minutes as a percentage of USCC’s total roaming minutes is infinitesimal. Indeed, fewer than 1% of USCC’s roaming revenues come from manual roaming;”⁶⁰
- SouthernLINC noted that most consumers refuse to manually roam;⁶¹
- RTG and OPASTCO state that “[m]anual roaming is a relic of the early cellular days and, like rotary dialing, is no longer in demand” and that “not one RTG or OPASTCO member reported any customers that utilized manual roaming;”⁶²
- Verisign, the largest roaming service bureau, acknowledged that less than 1 percent of the roamers offered manual roaming capability actually utilize it;⁶³
- Cingular and T-Mobile demonstrated that GSM networks were not capable of offering manual roaming.⁶⁴

Cingular demonstrated in its initial comments that the objectives behind the manual roaming rule have already been accomplished.⁶⁵ This showing, coupled the widespread recognition that manual roaming is rarely used, justifies elimination of the manual roaming rule.

⁶⁰ USCC Comments at 9-10 (emphasis added).

⁶¹ See SouthernLINC Comments at 30.

⁶² RTG/OPASTCO Comments at 5, 15.

⁶³ See VeriSign Comments at 2.

⁶⁴ See Cingular Comments at 16-18; T-Mobile Comments at 12.

⁶⁵ See Cingular Comments at 13-16.

CONCLUSION

For the foregoing reasons, as well as those set forth in the Hazlett White Paper, the Commission should eliminate the manual roaming rule and should refrain from adopting any automatic roaming regulations.

Respectfully submitted,

CINGULAR WIRELESS LLC

By: /s/ Carol L. Tacker
J. R. Carbonell
Carol L. Tacker
5565 Glenridge Connector, Suite 1700
Atlanta, GA 30342
(404) 236-5543

Its Attorneys

January 26, 2006